(3)

No. 92-166

In the Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 1500, the Claims Court lacks subject matter jurisdiction over "any claim for or in respect to which the plaintiff * * * has pending in any other court any suit or process against the United States" or its agents. The questions presented are:

1. Whether the Claims Court lacks jurisdiction under Section 1500 if at any time during the Claims Court proceedings the plaintiff has pending in another court a suit or process against the United States involving the same claim.

2. Whether petitioner's actions against the United States involved the same claim for purposes of Section 1500.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A34) is reported at 962 F.2d 1013. The opinion of the Claims Court (Pet. App. E1-E27) is reported at 17 Cl. Ct. 146.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1992. The petition for a writ of certiorari was filed on July 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In June 1979, petitioner filed a third-party complaint against the United States in *Miller* v.

Johns-Manville, No. 78-1283E (W.D. Pa.). Petitioner sought reimbursement for any tort liability it might incur for injuries caused by the plaintiff's exposure to asbestos while working for a private company that performed work for the United States Navy pursuant to a government contract. Pet. App. I1-I3. Petitioner voluntarily dismissed the third-party complaint in May 1980. Pet. App. E15.

b. In January 1980, petitioner commenced an omnibus tort action in the Southern District of New York against the United States seeking to recover money that it has paid or expects to pay to some 14,000 tort claimants who were exposed to asbestos while working at naval shipyards or for private companies acting under contract for the United States Navy. On September 30, 1981, the district court dismissed the action, primarily on the ground that petitioner's claims against the United States failed to meet the requirements of the Federal Tort Claims Act, 28 U.S.C. 2675(a). The court of appeals affirmed. *Keene Corp.* v. *United States*, 700 F.2d 836 (2d Cir.), cert. denied, 464 U.S. 864 (1983).

c. In 1982, after the district court in the Southern District of New York had rejected petitioner's tort claims, petitioner brought a second omnibus tort action against the United States in the District of Columbia. In July 1984, the district court held that principles of collateral estoppel required dismissal of petitioner's claims. *Keene Corp.* v. *United States*, 591 F. Supp. 1340, 1345-1349 (D.D.C. 1984). The court of appeals affirmed. *GAF Corp.* v. *United States*, 818 F.2d 901, 912-916 (D.C. Cir. 1987).

2. a. In December 1979—while petitioner's third-party complaint in *Miller* was pending—petitioner filed an action under the Tucker Act, 28 U.S.C. 1491, in the Court of Claims. *Keene Corp.* v. *United States*,

No. 579-79C. Petitioner sought indemnity from the United States for any amounts paid by petitioner to tort claimants exposed to asbestos while working at naval shipyards or for companies under contract to the United States Navy. Pet. App. H1-H20.

b. On September 25, 1981—after petitioner's third-party complaint in *Miller* was dismissed but while its omnibus tort action was pending in New York—petitioner filed a second action in the Court of Claims under the Tucker Act. *Keene Corp.* v. *United States*, No. 585-81C. In this action, petitioner contended that the government's recoupment of money paid under the Federal Employees' Compensation Act to federal workers injured by exposure to asbestos was a taking of property without just compensation, in violation of the Fifth Amendment. Pet. App. F1-F12.

3. In February 1987, the United States filed a motion in the Claims Court[1] to dismiss petitioner's complaints, and similar complaints brought by other asbestos manufacturers, for lack of subject matter jurisdiction pursuant to 28 U.S.C. 1500.[2] The government contended that the Claims Court lacked jurisdiction over the claims because petitioner had

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[1] Effective October 1, 1982, the Claims Court was established in place of the former Court of Claims at the trial level. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

[2] Section 1500 of Title 28 provides:

> The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when * * * [the] case arose, was, in respect thereto, acting or professing to act directly or indirectly under the authority of the United States.

other actions involving the same dispute pending in other courts.

In April 1987, the Claims Court granted the government's motion as to one claimant, Johns-Manville. *Keene Corp.* v. *United States*, 12 Cl. Ct. 197 (1987). The court did not rule on the motion with respect to petitioner or the other manufacturers, but noted that their claims likely would be dismissed under Section 1500 for lack of jurisdiction. *Id.* at 198-199 n.1. The court of appeals affirmed. *Johns-Manville Corp.* v. *United States*, 855 F.2d 1556 (Fed. Cir. 1988), cert. denied, 489 U.S. 1066 (1989).

4. a. In November 1988, the government filed a second motion to dismiss petitioner's claims under 28 U.S.C. 1500. The Claims Court granted the government's motion as to all plaintiffs except GAF Corporation.[3] The court held that Section 1500 required dismissal of the other asbestos manufacturers' claims, because at the time the actions were filed in the Claims Court, the plaintiffs had other actions involving the same dispute pending against the United States. The Claims Court rejected petitioner's argument that the subsequent termination of the district court actions vested it with jurisdiction over the complaints. Pet. App. E1-E27.

b. The court of appeals reversed. Pet. App. D1-D30. The court held that "when an earlier-filed district

[3] The Claims Court, relying on *Tecon Engineers, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966), held that Section 1500 did not apply to GAF because GAF filed its district court action one day after it filed suit in the Claims Court. Pet. App. E25-E26. The Claims Court subsequently rejected GAF's claims on the merits, and the court of appeals affirmed. *GAF Corp.* v. *United States*, 19 Cl. Ct. 490 (1990), aff'd, 932 F.2d 947 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 965 (1992).

court case is finally dismissed before the Claims Court entertains and acts on a § 1500 motion to dismiss, § 1500 does not bar Claims Court jurisdiction even though the dismissal may have occurred after the filing of the Claims Court action." Pet. App. D22.

Judge Mayer dissented. Pet. App. D26-D30. He concluded that the panel's holding "is contrary to the unambiguous language of the statute, its purpose and history." Pet. App. D26. Judge Mayer reasoned that the Claims Court's jurisdiction "should not depend on when a motion to dismiss under section 1500 is filed or is considered by the court, but on whether the same claim is before another court when the Claims Court suit is filed." *Ibid.* Otherwise, "jurisdiction turns on things like the state of the trial court's docket and the diligence of the assigned judge, factors completely unrelated to the purpose of section 1500 or any other jurisdictional statute, and which are bound to lead to erratic and unpredictable rulings." *Ibid.*

c. The court of appeals granted rehearing *en banc* and reinstated the decision of the Claims Court. Pet. App. A1-A24. The court of appeals reexamined its prior decisions and concluded that Section 1500 had become "rife with judicially created exceptions and rationalizations to the point that it no longer serves it purposes: to force an election of forum and to prevent simultaneous litigation against the government." Pet. App. A14. The court observed that "[i]t is a rare plaintiff who could not find an exception to his liking if he tried hard enough." *Ibid.*

The court of appeals concluded that the plain meaning of the statute, as well as its purpose, mandates a bright-line rule that the Claims Court lacks jurisdiction over a claim whenever the same claim is pending in another court. Accordingly, the court held:

> 1) if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction, regardless of when an objection is raised or acted on; 2) if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction, regardless of when the Court memorializes the fact by order of dismissal; and 3) if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of res judicata and available defenses apply.

Pet. App. A15.

The court of appeals declined to construe Section 1500 to permit "a plaintiff to maintain cases in both courts until the government moves to dismiss the Claims Court suit or until a judge addresses the motion." Pet. App. A16. The court explained that such a rule would defeat the "recognized purpose of section 1500" by "compel[ling] the government to defend two suits simultaneously." Pet. App. A16.

For similar reasons, the court also declined to read Section 1500 as turning on the order of the plaintiff's filings. Accordingly, the court overruled *Tecon Engineers, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966), which held that Section 1500 barred a plaintiff from commencing an action in the Claims Court if the claim was already pending in another court, but did not divest the Claims Court of jurisdiction if the plaintiff commenced an action on the same claim in another court after it filed an action in the Claims Court. Pet. App. A18-A19. The court also overruled several other cases that allowed plaintiffs to litigate the same claim in two courts at the same time, or created exceptions

contrary to the plain language of the statute. See Pet. App. A16-A17 & n.3.

The court then reaffirmed its holding in *Johns-Manville* that two actions involve the same "claim" for purposes of Section 1500 if they are based on the same operative facts. The court rejected the contention that a "claim" refers to a particular legal theory, explaining that such a narrow construction of "claim" would render Section 1500 ineffective against the very abuse it was intended to prevent. Pet. App. A19-A20.

Finally, the court of appeals rejected the argument that its decision should only apply prospectively. Because a court "lacks discretion to consider the merits of a case over which it is without jurisdiction, * * * a jurisdictional ruling may never be made prospectively only." Pet. App. A22-A23, quoting *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981).

Chief Judge Nies wrote a separate opinion suggesting that, where a party is barred by Section 1500 from litigating simultaneous actions against the United States in the Claims Court and another court, equitable tolling of the statute of limitations may be available in appropriate circumstances. See *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453 (1990). Pet. App. A24-A25.

Judge Plager dissented. Pet. App. A25-A34. In Judge Plager's view, the language of Section 1500 is not plain, and the legislative history indicates that Congress intended only to save the government the expense of relitigating cases in the Claims Court that it has already won in other courts. Judge Plager further concluded that Section 1500 is not a typical jurisdictional statute because it cuts off jurisdiction rather than creating it. Judge Plager would have

reaffirmed the rule that "when an earlier-filed district court [action] is finally dismissed before the Claims Court entertains and acts on a § 1500 motion to dismiss, § 1500 does not bar Claims Court jurisdiction." Pet. App. A31.

ARGUMENT

Petitioner contends (Pet. 8-9) that the decision of the court of appeals is a "radical exercise in judicial legislation." On the contrary, the decision of the court of appeals—which was joined by nine of the ten judges on that court—is faithful to the plain language and purpose of 28 U.S.C. 1500. Accordingly, further review is not warranted.

1. Section 1500 divests the Claims Court of subject matter jurisdiction over any claim "for or in respect to which" the plaintiff "has pending in any other court any suit or process against the United States." As this Court recognized in construing the predecessor of Section 1500, "the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship." *Corona Coal Co.* v. *United States*, 263 U.S. 537, 540 (1924).

a. Petitioner contends (Pet. 10-12) that the court of appeals erred by overruling *Tecon Engineers, Inc.*, v. *United States*, *supra*. *Tecon* held that Section 1500 bars Claims Court jurisdiction only if the plaintiff sues first in district court and then in the Claims Court, but not if the plaintiff sues first in the Claims Court and then in the district court. 343 F.2d at 946, 949.

As an initial matter, the court of appeals would have reached the same result in petitioner's case even if it had applied the *Tecon* rule. Petitioner had a claim

pending against the United States in *Miller* when it filed its first action in the Claims Court. And petitioner had an omnibus tort action pending against the United States in *Keene* when it filed its second action in the Claims Court. Consequently, the Claims Court lacked jurisdiction over petitioner's claims even under *Tecon*.

In any event, the court of appeals correctly held that the *Tecon* rule is contrary to the plain language of Section 1500, as well as the purpose of the statute and this Court's decision in *Corona Coal*. Pet. App. A10-A13, A18-A19.

Section 1500 plainly provides that the Claims Court lacks jurisdiction if the plaintiff "has pending" any action involving the same claim in another court. Contrary to that clear statutory command, *Tecon* allowed a plaintiff to litigate a claim simultaneously in the Claims Court and another court as long as the plaintiff filed first in the Claims Court.

The *Tecon* rule is also inconsistent with the purpose of Section 1500, which is to "prevent the prosecution at the same time of two suits against the Government." *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 355 (1932). See *Johns-Manville Corp.* v. *United States*, 855 F.2d at 1562. To achieve that purpose, Congress required plaintiffs to make an election whether to sue the government in the Claims Court or in some other forum. *Matson Navigation*, 284 U.S. at 356 (the stated purpose of the statute is to require "an election between a suit in the Court of Claims and one brought in another court"); see Cong. Globe, 40th Cong., 2d Sess. 2769 (1868). *Tecon* created a simple device that allowed plaintiffs to subvert the congressional purpose. As a leading authority stated, "Section 1500 does not belong on the books if, as the result in *Tecon* would indicate, it may readily be

evaded by the informed, and remains a trap only for [the] unfamiliar." See Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and its Agents*, 55 Geo. L.J. 573, 597 (1967).

In addition, the *Tecon* rule is inconsistent with this Court's decision in *Corona Coal*. The Court of Claims action in *Corona Coal* was filed well before the district court action—indeed, the initial decision was issued before the district court action was filed. 263 U.S. at 539. This Court nevertheless held that the predecessor of Section 1500 required dismissal of the Court of Claims action. 263 U.S. 539-540.[4]

b. For similar reasons, the court of appeals correctly held that Section 1500 does not authorize the Claims Court to exercise jurisdiction so long as all other pending actions concerning the same claim are terminated before the Claims Court rules on the government's motion to dismiss. See *Johns-Manville Corp.* v. *United States*, 855 F.2d at 1565. Section 1500 bars the Claims Court from exercising jurisdiction whenever a plaintiff seeks to litigate duplicative claims in the Claims Court and in another court at the same time. See *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86, 95 (1924); *Hill* v. *United States*, 8 Cl. Ct.

[4] Petitioner also contends (Pet. 13-14) that the court of appeals erred by refusing to overrule *Tecon* only prospectively. That contention is meritless. A federal court has no discretion to expand its subject matter jurisdiction. Consequently, a decision that the court lacks jurisdiction "may never be made prospectively only." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981). In any event, as we have explained, the result in this particular case would have been the same even under *Tecon*. The court of appeals' decision therefore is no different, in practical effect, from a prospective overruling of that case.

382, 385-386 (1985) ("words 'shall not' are an absolute bar depriving this court of any discretion, whatsoever, when duplicative claims are filed"). The jurisdictional bar of Section 1500 remains in force until suit or process in the other court is terminated. Once the other suit is terminated, the plaintiff may then sue in the Claims Court, as long as the action is not barred by the statute of limitations. But the termination of the other action does not mean that the Claims Court had jurisdiction while the other suit was pending. See *British Am. Tobacco Co.* v. *United States*, 89 Ct. Cl. 438, 441 (1939), cert. denied, 310 U.S. 627 (1940).

Nor does the jurisdictional bar of Section 1500 spring into existence only if and when the government files a motion to dismiss for lack of jurisdiction. Section 1500, like other limitations on the subject matter jurisdiction of federal courts, cannot be waived by the parties. *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 383 (1884). Thus, the court of appeals correctly rejected petitioner's arguments for "a free floating jurisdictional bar that attaches only when the government files a motion to dismiss or, worse, when the court gets around to acting on it." Pet. App. A16. As the court of appeals recognized, such a rule would create "arbitrary and whimsical jurisdictional result[s]." Pet. App. A15.

2. Petitioner contends (Pet. 14-16) that Section 1500 does not require dismissal of its claims because those claims "differ[] markedly" from the claim it raised in *Miller* v. *Johns-Manville*, No. 78-1283E (W.D. Pa. 1979). The Claims Court held that petitioner's third-party complaint in *Johns-Manville* was a

"suit[] on the same claims as [petitioner's] claims filed in the Court of Claims." Pet. App. E21. The Claims Court concluded that the claims were "framed upon a homogeneity of operative facts," Pet. App. E20, and the court of appeals said it had "no quarrel with the Claims Court determination that the underlying facts in *Miller* and [the Claims Court actions] are the same." Pet. App. A22. That fact-bound determination merits no further review.

Moreover, while petitioner was litigating its claims in the Claims Court it also litigated two major omnibus tort actions against the United States. Those two actions involved the same claim that was pending before the Claims Court—whether the United States was liable to petitioner for payments to workers injured due to asbestos exposure while working at naval shipyards or to fulfill government contracts. Consequently, even if petitioner had not filed a third-party complaint against the United States in *Miller*, its simultaneous litigation of the same dispute in two other federal district court actions between 1979 and 1987 divested the Claims Court of jurisdiction over petitioner's claims under 28 U.S.C. 1500.

3. Finally, petitioner contends (Pet. 16-20) that the consequences of dismissing its actions under Section 1500 are unduly harsh. The short answer to that contention is that "the words of the statute are plain," and therefore the courts "are not at liberty to add an exception in order to remove apparent hardship." *Corona Coal Co.* v. *United States*, 263 U.S. at 540. That principle applies with added force where, as here, plain statutory language limits the subject matter jurisdiction of federal courts.

Petitioner asserts (Pet. 17) that courts "must hold the Government-as-defendant to the same standards it

would apply in a contribution claim against General Motors." Petitioner overlooks the principle that "the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction.'" *United States* v. *Testan*, 424 U.S. 392, 399 (1976), quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Section 1500 places a condition on the government's waiver of sovereign immunity that the courts must enforce.

Although petitioner complains that it has been deprived of any opportunity to litigate its claims against the United States, it was petitioner who chose to file multiple lawsuits against the United States raising essentially the same claim in the Western District of Pennsylvania, the Southern District of New York, the District of Columbia, and the Claims Court.[5] As the court of appeals explained, there is "no harm in requiring a party to carefully assess his claims before filing and choose the forum best suited to the merits of the claims and the applicable statutes of limitations." Pet. App. A14. Nor is petitioner correct in asserting (Pet. 17) that Section 1500 serves no useful purpose. "[A] prohibition against suing the government simultaneously in multiple forums, and the likely inability to sue the government twice successively, are even more salutary in this day of excessive litigation than they were back in the Civil War era whence section 1500 comes." Pet. App. A14-A15.

[5] In view of the fact that petitioner has engaged in years of litigation against the United States in these various courts, petitioner's assertion (Pet. 15) that it was "not attempting to force the Government to defend itself in two places at once" is surprising.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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